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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 175-183) is reported at 330 F.2d 853. The opinion of the United States District Court for the District of Columbia (R. 133-156) and the District Court's supplemental opinion (R. 166-170) are reported at 218 F. Supp. 114.

JURISDICTION

The judgment of the Court of Appeals (R. 184, 185) was entered on March 12, 1964. The petition for a writ of certiorari was filed on June 1, 1964, and was granted on October 12, 1964 (R. 188). The jurisdiction of this Court rests on Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented:

1. Are determinations of the National Mediation Board in the conduct of a representation investigation pursuant to the provisions of Section 2, Ninth of the Railway Labor Act (a) refusing to hold a hearing for the purpose of redetermining the composition of an already established craft or class of employees among whom a representation election shall be held, and (b) refusing to revise a long established form of ballot to be used in such an election to include thereon a space for employees to affirmatively vote against any representation, subject to judicial review?

2. If such determinations are subject to judicial review, did the National Mediation Board violate any statutory command or abuse the discretion committed to it by Section 2, Ninth of the Railway Labor Act in the conduct of a representation dispute by (a) refusing to hold a hearing for the purpose of redetermining the composition of an already established craft or class of employees among whom a representation election shall be held, and (b) refusing to revise a long established form of ballot to be used in such an election to include thereon a space for employees to affirmatively vote against any representation?

STATUTES INVOLVED

The principal statutory provision involved is Section 2, Ninth of the Railway Labor Act, (45 U.S.C.A., Section 152, Ninth). This Section reads as follows:

> "If any dispute shall arise among a carriers's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed neces-

sary by it to carry out the purposes and provisions of this paragraph."

Other statutory provisions cited are quoted in full in Appendix A hereto.

STATEMENT

This litigation had its origins in an application filed by the Brotherhood of Railway and Steamship Clerks with the National Mediation Board on August 24, 1962, requesting a certification of the Brotherhood by the Mediation Board to represent, under the Railway Labor Act (45 U.S.C.A., Section 151 et. seq.) the following craft or class of employees of United Air Lines, Inc.: (R. 36).

> "Commonly known as clerical, office, stores, (excluding stores employees represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employees represented as of August 24, 1962 by the International Association of Machinists) and passenger service employees".

This application stated that there were 12,000 employees involved and there were submitted with the application 6,606 authorization cards of such group of employees, stating their desire to be represented by the Brotherhood. The application further stated that these employees were not now represented by any organization for purposes of the Railway Labor Act. (R. 6, 36, 50.)[1]

The application was filed pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act (45

[1] The Brotherhood was the duly authorized representative under the Railway Labor Act of the craft or class involved on Capital Airlines prior to the merger of that airline into United Air Lines on or about June 1, 1961. (R. 50.)

U.S.C.A., Section 152, Ninth), quoted in full page 3, *supra*.

On August 27, 1962, Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, wrote to the President of the Brotherhood, acknowledging the application. This letter also contained the following statement: (R. 48)

> "We observe from the craft description that stores employees represented as of August 24, 1962, by the International Association of Machinists, and fleet service employees represented by the same association as of the same date, are excluded from the application.
>
> "Please advise us of the significance of the date contained therein. Is it the position of your organization that employees hired in the excluded categories after August 24, 1962 would be covered by the application?"

In a letter, dated August 29, 1962, the President of the Brotherhood replied to Mr. Thompson. This letter contained the following statement as to the reasons for the Brotherhood's application excluding certain employees represented by the International Association of Machinists: (hereinafter called "IAM")

> "The meaning of our exclusion was simply that we did not intend to include in our application the incumbent of any occupation or position represented by the International Association of Machinists on August 24, 1962, but we did intend to include the incumbents of all occupations in those categories if they were represented by the International Association of Machinists by reason of an agreement with the United Air Lines, Inc., entered into at a date subsequent to August 24, 1962. Any employe hired by United Air Lines subsequent to

August 24, 1962, in the excluded categories, namely, those positions for which the International Association of Machinists was the collective bargaining agent as of August 24, 1962, is to be excluded from the representation dispute.

"In other words, and to state it simply, we wish to make it clear that our request for the services of the Board is not intended to include the incumbent of any position for which the International Association of Machinists was the collective bargaining agent on August 24, 1962, or the persons occupying those positions subsequent thereto.

"I hope I have made it quite clear that we are not contending in our application to the Board for the representation rights of the occupant of any position for which the International Association of Machinists had representation rights on August 24, 1962."

On August 30, 1962, Mr. Thompson, by letter, advised United and the IAM of the Brotherhood application. (R. 53.)

On September 7, 1962, United, in a letter signed by Mr. Charles M. Mason, Senior Vice President, Personnel, advised the Mediation Board that, in its view, the Brotherhood application "is inconsistent with the National Mediation Board's determination of craft or class in Case No. R-1706 et al." United, therefore, took the position that the application involved only a part of a group of employees which the Board had found to constitute a craft or class and should be dismissed. (R. 55.) In addition, United's letter requested that, in the event the Mediation Board did not dismiss the Brotherhood's application, it should hold a public hearing to determine whether or not the proper craft

or class was that expressed in prior determinations of the Mediation Board.

On September 11, 1962, the IAM, by letter, advised the Mediation Board that "it is our considered opinion that the craft or class of employees as requested by the Brotherhood does not conform to the findings of your Board, particularly with reference to the craft of class determination as set forth in Case R-1706 et al." (R. 57.)

Case No. R-1706 et al., which United and the IAM cited, was a formal decision issued by the Mediation Board on January 31, 1947, identified as "In the Matter of Representation of Employees of the National Airlines, Inc., Northeast Airlines, Inc., Pan American Airways, Inc., Pennsylvania-Central Airlines Corp., Radio Operators and Teletype Operators; Clerical, Office, Stores, Fleet and Passenger Service Employees —Determination of Craft or Class".[2] In this decision, the Mediation Board, upon the basis of extensive findings of fact with respect to airline operations, and the duites of employees involved in such operations, determined that, for purposes of representation under the Railway Labor Act, clerical and office employees, including office attendants, stores employees, fleet service employees and passenger service employees constituted a craft or class.

On October 5, 1962, the Brotherhood, in the light of the United and IAM objectives, amended its application to include the entire craft or class of clerical office, stores, fleet and passenger service employees of United, as described in Mediation Board determination R-1706.

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[2] The case involved Mediation Board Dockets Nos. R-1706; R-1708; R-1719; R-1720; R-1721; R-1729; R-1735. (R. 37.)

(R. 59.) The amended application was docketed as NMB Case No. R-3590 on November 8, 1962. (R. 37.)

On November 19, 1962, the Mediation Board assigned a mediator to check the authorization cards furnished by the Brotherhood in support of its application against a list of employees of the carrier (R. 37). On December 19, 1962, the Mediation Board authorized that an election be conducted among the employees involved based on the mediator's report that his investigation showed sufficient evidence to warrant a finding that a representation dispute existed among these employees under the Board's rules. (R. 37.) On the same day, the mediator requested United to furnish, by January 14, 1963, for the purposes of such election, a list of the employees involved, showing names, occupations, locations, and home mailing address. (R. 37.)

On January 11, 1963, United advised the Mediation Board by letter that the mediator's request for the list of employees to conduct an election "is premature in the absence of a ruling from the Mediation Board on the request of United made September 7, 1962 that a public hearing be held to establish the proper crafts and classes on United." The letter further stated that United renewed its request that such a public hearing be held. (R. 61.) In fact, United, by its letter of September 7, 1962, had requested a hearing for such a redetermination of the craft or class only in the event that the Board did not dismiss the Brotherhood's original application because it did not cover the whole craft or class set forth in the Mediation Board's determination identified as R-1706. (R. 56.) When the Brotherhood amended the application on October 5, 1962 to embrace the whole craft or class covered by that determination, that objection was eliminated, and

United did not make another request for a hearing. It waited until January 11, 1963, or more than three weeks after the mediator had requested the carrier to supply a list of the employees for the purpose of holding an election on the Brotherhood's amended application to ask for a hearing to redetermine the scope of the craft or class.

On January 17, 1963, Mr. Thompson, by direction of the Mediation Board, advised United that its request for a hearing was denied. Mr. Thompson's letter read, in pertinent part, as follows: (R. 70)

> "The application filed by the Brotherhood of Railway and Steamship Clerks on August 24, 1962 was not dismissed, and was subsequently amended to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employees. You were so advised by copy of Mr. Harrison's letter of October 5, 1962 transmitted with copy of our letter to Mr. Harrison dated October 8, 1962.
>
> "In our letter of October 24, 1962, addressed to you and President Hayes of the International Association of Machinists, we inquired whether you were in a position to furnish the number of employees in this craft or class as requested in the last paragraph of our letter of October 8, 1962. On November 2, 1962 you replied and stated 'the records of United Air Lines indicate there is a total of 12,451 employees as of October 15, 1962 in such craft as we understand it'. You further stated this figure did not include 339 employees classified as Lead Janitors or Cleaning Women as of October 15, 1962. Your letter of November 2, 1962 indicated a clear understanding of what is meant by the craft or class commonly known as Clerical Office, Stores, Fleet and Passenger Serv-

ice Employees as referred to in the Board's determination issued in NMB Case No. R-1706, et al.

"The various comments made in the remainder of your letter of January 11, 1963 have been given careful consideration by the Board. The Board wishes to call your attention, first, to the fact that the carrier is not a party to this representation dispute. Secondly, no request for a review of the craft or class established by the Board's determination in Case No. R-1706, et al. has been received from either organization party to NMB Case No. R-3590. *The request contained in your letter of January 11, 1963 is not timely made, since the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class, and has authorized an election.*

"For the above reasons, the Board must deny your request of January 11, 1963 for a public hearing on the subject of a review of the determination made in Case No. R-1706, et al." (Emphasis added)

The letter concluded by requesting United to furnish promptly to the mediator the necessary information regarding the employees involved, so that an election could be held.

On January 18, 1963, United addressed a letter to the Chairman of the Mediation Board, stating that it was "willing" to allow a ballot box election on the company property, provided that the Board should use a form of ballot which would provide a space for "no representation". This letter also stated that "we want to make it very clear that United Air Lines recognizes that how a representation election is conducted is the function of the National Mediation Board". The letter stated, however, that the carrier strongly felt that the ballot previously used by the Board was not adequate

because it did not provide a space for the employee to vote "no representation". (R. 79.)

On January 24, 1963, the Executive Secretary of the Mediation Board, at the direction of the Board, replied to United's letter, advising the carrier that it saw "no reason to deviate from its customary form of ballot in the current dispute, and it will be used by the mediator in conducting the election in Case No. R-3590". (R. 86.) This letter read, in pertinent part, as follows:

> "As you state in your letter, the form of ballot presently used was adopted by the Board in 1934 and has been used since that time as the form best designated to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a "yes" or "no" ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act * * *."

The form of ballot to which the Mediation Board's letter refers as having been in use since 1934, provides a square in which the voting employee may mark an "X" if he wishes to vote to be represented by any of the organizations or individuals whose names are listed thereon. It also has an additional space in which the employee may insert the name of any other organi-

zation or individual whom he desires to represent him. (R. 87, 112.)

The background and reason for this traditional form of ballot used by the Mediation Board in some 3,400 representation elections under the Railway Labor Act since 1934 is stated by the Board as follows: (R. 162, 163)

> "Occasionally, it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of the representation preference. The Mediation Board adopted, among the first rules issued by it, its present form of ballot and it has been used consistently since that time.
>
> "The pertinent part of the ballot provides a space to vote for the contending organizations and, in addition thereto, the following:
>
> > If you desire to be represented by any other organization or individual write the name of such organization or individual in the space below.
> >
> > . . . . . .
> >
> > And mark an "X" in this square ☐
>
> "The form of ballot used is based on the general purpose of the Railway Labor Act as contained in section 2, which provides, among other purposes, for the complete independence of carriers and of employees in the matter of self organization; and, 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules of working conditions.' In the furtherance of these general purposes, section 2, second, of the act makes it the duty of the carriers and their employees to consider and, if possible, decide, all disputes, 'in conference between representatives designated and authorized so to confer, respectively,

by the carrier or carriers and by the employees thereof interested in the dispute.' Section 2, third, provides that 'representatives, for the purpose of this act, shall be designated by the respective parties without interference, influence, or coercion by either party after the designation of representatives by the other * * *.'

"The above-quoted excerpts from the act show clearly that it was the intent of Congress in framing the 1934 amendments to the original Railway Labor Act of 1926, that both the carriers and employees separately designate representatives for the purposes of collective bargaining. To effectuate this mandate of the Congress, the National Mediation Board, in 1934, designed the form of ballot which has been used without material change to the present time. This ballot was drafted to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above. It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the act."

On January 25, 1963, United wrote to the Mediation Board, asking the Board to reconsider the Board's refusal to hold a public hearing to redetermine the scope of the class or craft involved, as requested in United's letter of January 11, 1963. (R. 72.) On February 4, 1963, the Mediation Board denied United's request for reconsideration of the Board's earlier decision not to redetermine the craft or class involved. (R. 76.)

On February 1, 1963, United requested reconsideration of the Mediation Board's decision of January 24, 1963 with respect to the form of ballot to be used in the impending representation election upon the property of the carrier. (R. 89.) This request was denied by

the Mediation Board on February 6, 1963, on the basis of the reasons previously given. (R. 96.)

On February 4, 1963, the mediator inquired of United as to the status of its list of the employees eligible to vote in the representation election and was advised by the carrier that the list would be completed by approximately February 11, 1963. (R. 39.) On that date, the mediator made further inquiry concerning the status of the list and was advised that the carrier had decided to refuse to furnish the list. The carrier formally notified the Board of its refusal by letter of the same date. (R. 40.)

Also on February 12, 1963, United filed a complaint in the United States District Court for the District of Columbia, *United Air Lines, Inc.*, v. *National Mediation Board, et al.* (Civil Action 402-63), in which United asked the District Court to enjoin the Mediation Board from conducting any election among the carrier's employees or certifying any representation with respect thereto upon the Brotherhood's application in Case No. R-3590 without first conducting a hearing, and according United an opportunity to be heard as a party in interest, on the question of the appropriateness of the class or craft of employees among whom the election should be held. In addition, the complaint asked the Court to enjoin the Mediation Board from conducting the election unless the form of ballot used permitted an eligible employee affirmatively to vote against representation.

On March 25, 1963, the District Court granted a motion of the National Mediation Board to dismiss the complaint. Thereafter, United appealed this judgment and order to the Court of Appeals. Such appeal was designated as Case No. 17,777.

In the meantime, on February 14, 1963, the Assoication for the Benefit of Non-Contract Employees filed a petition with the National Mediation Board, asking leave to intervene in the representation proceedings before that Board in Case No. R-3590. This petition also requested (1) a redetermination of the craft or class grouping involved in the election, either with or without a hearing, and (2) that the form of ballot to be used in the representation election be changed to provide a place for employees to vote affirmatively for no representation. (R. 43, 102.) On February 24, 1963, the Association advised the Board that it did not seek recognition as a bargaining agent and did not want its name on the election ballot, and would be dissolved after it had served its purpose. (R. 111.)

On March 27, 1963, the Mediation Board denied the petition of the Association. (R. 14, 26, 44.) On April 5, 1963, such Association requested reconsideration of this action, which the Mediation Board denied on April 12, 1963. (R. 44, 45, 111.)

The Mediation Board completed the formulation of an eligible list of voters and the representation election was scheduled to be conducted by mail ballot on April 22, 1963. (R. 26, 27.) On April 13, 1963, the Association filed a complaint in the United States District Court for the District of Columbia, asking that Court to enjoin the Mediation Board from conducting such election among the class or craft involved unless the Board should (1) first conduct a hearing relative to the appropriateness of the class or craft designated; (2) grant the Association status as a party in said hearing; and (3) offer a ballot upon which voting employees could vote for or against representation. (R. 4-9.)

The Association also filed a motion for a preliminary injunction on April 13, 1963 (R. 2, 22), which was opposed by the National Mediation Board. (R. 35.)

On April 18, 1963, the District Court issued a temporary restraining order prohibiting the Mediation Board from conducting the representation election scheduled for April 22, 1963. (R. 2, 33.)

On May 3, 1963, the District Court granted a preliminary injunction which read as follows: (R. 132)

> "ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted, and it is
>
> "FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

This preliminary injunction was accompanied by findings of fact and conclusions of law. (R. 129-156.)

On May 10, 1963, the Mediation Board filed a motion to dismiss the complaint, or in the alternative for summary judgment. (R. 159.) At the same time the Board responded to the District Court's order of May 3, 1963, to show cause why the preliminary injunction should not be made permanent, opposing a permanent injunction and requesting that the preliminary injunction be vacated or stayed to permit the Mediation Board to conduct the proposed election. (R. 158.)

On May 8, 1963, the Brotherhood filed a petition to intervene as a party defendant in the case and tendered to the District Court an answer to the complaint. (R. 3, 157.) By order dated May 29, 1963, the District Court granted the Brotherhood's motion to intervene. (R. 171.)

On May 29, 1963, the District Court also entered its final judgment and order, which enjoined the National Mediation Board in the conduct of an investigation of the representation dispute on the property of United as follows: (R. 170)

> "FURTHER ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion

that the Railway Labor Act, 45 U.S.C. § 151 *et seq* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

On July 16, 1963, the Brotherhood appealed the judgment of the District Court by filing a notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure. (R. 172.) This appeal was designated as Case No. 18,072. On July 26, 1963, the National Mediation Board filed a notice of appeal from the judgment of the District Court. (R. 173.) This appeal was designated as Case No. 18,068.

The Court of Appeals consolidated United's appeal from the District Court order dismissing its Complaint in Case No. 17,777 with Cases Nos. 18,068 and 18,072 for hearing and decision. On March 12, 1964, the Court of Appeals issued its opinion in the consolidated cases. (R. 175-177.) In this opinion, the Court of Appeals affirmed the judgment of the District Court dismissing the complaint of United on the grounds that the carrier lacked standing to sue. The opinion affirmed the judgment of the District Court on the appeals of the Brotherhood and the National Mediation Board in Cases Nos. 18,068 and 18,072.

Circuit Judge Wright filed a separate concurring and dissenting opinion. (R. 178-183.) In this opinion, Judge Wright concurred in the decision to affirm the District Court's dismissal of the complaint by United, but dissented from the majority opinion affirming the District Court's judgment on the appeals of the Brotherhood and the National Mediation Board.

The majority opinion affirming the District Court's judgment on the appeals of the Brotherhood and the

National Mediation Board adopted the opinion of the District Court. (R. 177.)

SUMMARY OF ARGUMENT

I

Section 2, Ninth of the Railway Labor Act places a duty upon the National Mediation Board at the request of employees of a carrier parties to a representation dispute on the property of a carrier to investigate the dispute and certify the name or names of the individuals or organizations designated and authorized to represent the employees involved. The statute does not require the National Mediation Board to follow any designated procedure in the conduct of such investigation. It specifically authorizes the Board to take a secret ballot of the employees involved or "to utilize any other appropriate method" of ascertaining the duly designated and authorized representatives of the carrier's employees in such manner as to insure a choice without interference, influence, or coercion exercised by the carrier. If the Board determines to conduct an election the statute provides that it shall designate who may participate and establish the rules to govern such election. The Brotherhood requested the Board under this statutory provision to investigate and determine the representatives of a craft or class of employees of United Air Lines known as clerical, office, stores, and passenger service employees. A determination of the composition of this craft or class on the property of United among whom a representation election should be held is committed to the National Mediation Board by Congress and such determination is not subject to judicial review. Likewise, a determination by the Mediation Board as to the form

of ballot to be used in such an election constitutes an exercise of discretion by the Mediation Board as to the rules to govern such election which is not subject to judicial review. *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297.

The decision of the Mediation Board not to hold a hearing for the purpose of redetermining the composition of the craft or class among whom the representation election should be held does not violate any right granted to United Air Lines or to any of the employees of that carrier by Section 2, Ninth of the Railway Labor Act or by the United States Constitution. Likewise, a determination by the Board that it would not revise the form of ballot to be used in such representation election so as to include thereon a place for employees to affirmatively vote "no union" does not violate any right given to the carrier or to its employees by either the United States Constitution or Section 2, Ninth or any other provision of the Railway Labor Act. These determinations constitute decisions as to the manner in which the Mediation Board shall carry out its functions under Section 2, Ninth and are not thus subject to judicial review. The decision below that the Mediation Board's determination violates the stated policy of the Railway Labor Act of majority determination is in error since the Board requires a majority of the craft or class to vote in an election before it will certify a representative. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560.

II

The basic purpose of the Railway Labor Act (45 U.S.C.A., Sections 151 et seq.) is to avoid interrup-

tions to commerce or to the operation of carriers engaged therein and to provide for the prompt and orderly settlement of disputes between employees and carriers. The statute is aimed at accomplishing this purpose by inducing collective bargaining between representatives of the employees and carriers to settle labor disputes. This basic purpose of the statute was recognized by this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515.

The determinations made by the Mediation Board with respect to the composition of the craft or class in this case reasonably contribute to such purpose without depriving either United Air Lines or any of its employees of any constitutional or statutory right. In refusing to conduct a hearing to redetermine the previously established composition of the craft or class of United's employees among whom a representation election would be held, the Mediation Board was simply exercising its discretion to maintain the stability of existing collective bargaining agreements and employee-employer relationships in the airline industry. The Board's decision to continue in use a form of ballot which it has successfully used for more than 30 years in some 3400 representation elections was based upon a long standing and publicly stated belief that such form of ballot contributed to the statutory scheme while a revision of the ballot as requested would contribute to, if not actually encourage, the circumvention of the Congressional purpose. This is a reasonable and valid judgment. There is no compulsion upon any employee to vote for any representative or to vote in the representation election at all. If the employee does not wish to have a representative, he may refrain from voting for any one of those seeking certification

as a representative. If a majority of the employees do not wish to vote for a representative, then none can be certified.

ARGUMENT

I

The Determinations of the National Mediation Board With Respect to the Composition of the Craft or Class of Employees of United Air Lines Among Whom a Representation Election Should be Held and the Form of Ballot to be Used in Such Election Are Not Subject to Judicial Review

The action of the National Mediation Board, which is the subject of this litigation, was taken in the course of that Board's conduct of an investigation to determine who are the representatives of a designated craft or class of employees of United Air Lines upon application of the Brotherhood of Railway and Steamship Clerks to the Board under Section 2, Ninth of the Railway Labor Act. The cited statutory provision (quoted above at page 3) requires the Board upon the request of a party to a representation dispute among employees of a carrier subject to the Railway Labor Act to investigate the dispute and to certify the designated and authorized representative of the employees involved. It further requires the carrier involved to treat with the representative so certified. The statute does not direct that the Mediation Board shall conduct its investigation in any particular manner. Indeed, the statute specifically authorizes the Board to conduct a representation election among the employees involved or to utilize "any other appropriate method" of ascertaining the authorized representative. The only limitation is that the method used shall insure the choice of representatives "without interference, influence or coercion exercised by the carrier." The statute spe-

cifically provides that if the Board does decide to hold a representation election it shall designate the participants and it shall establish the rules to govern the election.

In the present case, the National Mediation Board decided in the conduct the investigation required of it under Section 2, Ninth of the statute to hold a representation election on the property of United Air Lines. For this purpose, it exercised its statutory authority to designate the employees who would participate in such representation election. This designation embraced the long established craft or class of clerical, office, stores, and fleet and passenger service employees as such craft or class had previously been determined by the Board. (R. 37.) The Board refused the request of both United and the Association for the Benefit of Non-Contract Employees to either change the craft or class or conduct a hearing for the purpose of redetermining such craft or class. (R. 70, 14, 26, 44, 45, 111.) The Board also exercised its statutory authority to establish the rules governing such election, including the form of ballot to be used therein. In so doing, it refused the request of both United and the Association for the Benefit of Non-Contract Employees to revise the form of ballot to be used to specifically provide thereon a place for the employees to affirmatively vote "no union". (R. 86, 89, 111.) The Brotherhood submits that these actions of the Mediation Board constituted determinations of the Board as to the manner in which it should conduct its duties under Section 2, Ninth of the Railway Labor Act and are not subject to judicial review.

In 1943, this Court held that determinations of the National Mediation Board with respect to matters com-

mitted to the Board's judgment under Section 2, Ninth of the Railway Labor Act were not subject to judicial review. *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297 (1943); *General Committee, BLE* v. *Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943); *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America, et al.*, 320 U.S. 715 (1943).[3] In the *Switchmen's Union* case, this Court referred to the extreme care which Congress had taken in the enactment of Section 2, Ninth to protect the Mediation Board in the handling of representation problems (pages 302, 303). The Court then observed as follows: (page 303)

> "Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain."

This Court also compared the authority of the Mediation Board under Section 2, Ninth to that of the Interstate Commerce Commission under Section 204 of the Transportation Act of 1920, the exercise of which was not subject to judicial review whether the Commission

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[3] In the latter case, this Court reversed a judgment of the United States Court of Appeals for the District of Columbia Circuit subjecting to judicial review a determination of the National Mediation Board to dismiss an application for invesitgation of a representation dispute. *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America*, 137 F. 2d 817 (1943).

made an error of fact or of law, and set forth the following conclusion: (page 305)

> "In the present case the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the Butte A. & P. R. Co. Case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

In the *General Committee* case, decided on the same day, this Court likewise refused to review a decision of the National Mediation Board in a controversy between two unions as to which was the proper collective bargaining representative under the Railway Labor Act. In its opinion in that case, the Court stated as follows: (page 337)

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected

where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration."

These decisions have been the established law with respect to determinations of the National Mediation Board in the performance of its functions under Section 2, Ninth for more than two decades. During this period of time, the lower Federal courts have consistently refused to review determinations of the National Mediation Board as to the manner in which it shall conduct its investigation under Section 2, Ninth and the decisions which it has made in the conduct of such investigations. *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 314 F.2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 294 F.2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Mediation Board, et al.*, 294 F.2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 258 F.2d 153 (D.C. Cir., 1958); *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 189 F.2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 179 F.2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 141 F.2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 141 F.2d 725 (D.C. Cir., 1944); *Brotherhood of Railway and Steamship Clerks, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F.2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F.2d 944 (4th Cir., 1950).

These decisions included the decision of the Court of Appeals for the District of Columbia Circuit in the *Decker* case, *supra*, in which that court sustained a dismissal of a complaint alleging that the Mediation Board had denied a right to vote of certain employees in a representation election and made the precise challenge to the form of ballot used by the Mediation Board as is made in the present case.

The one case in which a determination of the National Mediation Board under Section 2, Ninth was subjected to review during this period was the decision in *Airline Dispatchers Association; et al.* v. *National Mediation Board, et al.*, 189 F.2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849. In that case the Mediation Board had made a determination that it did not have any power to act under Section 2, Ninth with respect to a representation dispute involving employees of United States air carriers employed outside of the United States. The question presented for judicial review was whether or not the Board's interpretation of the statute was correct. In holding that the decision of the Board with respect to such a question was subject to judicial review, the Court of Appeals drew a sharp distinction between such an issue and cases concerning issues of the manner in which the Board has performed its functions under Section 2, Ninth. It pointed out that decisions of the Mediation Board in the latter category were not subject to judicial review. That Court's statement on this point read as follows: (pages 687-688)

> "In each of these cases[4] the Board had chosen between alternate methods of settling a dispute

[4] The reference was to cases in which judicial review of Mediation Board determinations had been rejected.

over representation under Section 2, Ninth, of the Act. The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner. The case now before us is quite different. Here there has been a refusal to take any action to resolve the dispute, upon the view that Congress has not extended the powers of the Board to an employer and its employees geographically situated as are these disputants; that is, outside the continental United States and its territories. This in no sense is Board action within the framework of Section 2, Ninth, or, indeed, within any other of the provisions of the Act for administrative resolution of industrial-labor disputes. This is a different 'type of problem' (320 U.S. at page 301, 64 S.Ct. at page 97, 88 L.Ed. 61)."

Similarly, in the case of *Leedom* v. *Kyne,* 358 U.S. 184 (1958), this Court held that a decision of the National Labor Relations Board, which was in direct violation of a specific statutory command of Section 9 (b)(1) of the National Labor Relations Act (29 U.S.C.A., Section 159(b)(1)), was subject to judicial review. This Court explained the difference between such situation and that involved in the *Switchmen's Union* case in the following language. (pages 189-190)

"In Switchmen's Union v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S. Ct. 95, this Court held that the District Court did not have jurisdiction of an original suit to review an order of the National Mediation Board determining that all yardmen of the rail lines operated by the New York Central System constituted an appropriate bargaining unit, because the Railway Labor Board had acted within its delegated powers. But in the course of that opinion the Court announced principles that are controlling here. 'If the absence of jurisdiction of the federal courts meant a sacri-

fice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 US 548, 74 L ed 1034, 50 S Ct 427, and Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 81 L ed 789, 57 S Ct. 592. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.' Id. 320 US at 300.

"Here, differently from the Switchmen's Case, 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control (A. F. of L. v. NLRB, 308 US 401, 84 L ed 347, 60 S Ct 300, supra), to protect and enforce that right."

The present inquiry, therefore, must clearly be directed to the question of whether or not the action of the National Mediation Board here involved violated a direct statutory command.

The opinion of the District Court, adopted by the Court of Appeals, states that "The basic question is whether the Railway Labor Act denies to voters certified as eligible to vote in an election held pursuant to 45 U.S.C. Section 152, Ninth, for the selection of a collective bargaining representative, the chance to vote for no representation at all." (R. 144.) This statement

of the problem completely reverses the nature of the inquiry to be made to determine whether there is present a case for judicial review, as set forth in this Court's decisions quoted above. Instead of an examination of the statute to determine whether the Mediation Board has violated any commands thereof or obliterated any rights provided therein, the decision below substitutes an inquiry into whether the statute prohibits the form of ballot sought by United and the respondent. The Brotherhood submits that this approach is erroneous. Section 2, Ninth authorizes the Mediation Board to establish rules governing a representation election. Under this Court's decisions discussed above, the Board determination to use a particular form of ballot is not open to judicial review unless it violates a direct statutory command.

The District Court did hold that the action of the Mediation Board with respect to the form of ballot to be used gave rise to a serious issue of statutory construction possibly rising to constitutional dimensions and was therefore subject to judicial review under the decision in the *Airline Dispatchers* case and this Court's decision in *Leedom* v. *Kyne, supra.* (R. 143, 144, 168, 169.) The Court of Appeals adopted the view of the District Court. (R. 177.) Neither the District Court nor the Court of Appeals cited any specific provision of Section 2, Ninth or of any other provision of the Railway Labor Act which the Mediation Board's decision violated. Rather their conclusion was based upon a finding that the Board's use of its present ballot in a representation election on the property of United "would obliterate the right to vote for no collective bargaining representation and would thus be contrary to the Railway Labor Act's stated policy of majority

determination." (R. 169.) The Courts below therefore, concluded that the Mediation Board's action with respect to the form of ballot to be used raised a question of statutory construction which is subject to judicial review.

However, the form of ballot which has been used by the National Mediation Board for some 30 years (R. 161) does not violate any stated policy of the Railway Labor Act of majority determination. If less than a majority of eligible employees of a craft of class participate in a representation election, then the Mediation Board will not certify a representative under Section 2, Ninth. (R. 122.) Its form of ballot does not, therefore, violate any statutory policy of majority determination unless the statute is read as requiring a majority of the craft or class to vote for a particular representative in order for that representative to be designated under Section 2, Ninth. There is no such requirement in the statute. Section 2, Ninth leaves to the Board the designation of those who may participate in the election and the establishment of rules to govern the election. Section 2, Fourth of the statute (45 U.S.C.A., Section 152, Fourth) provides that a "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." However, this provision does not require that a representative secure a majority of the votes of the craft or class in order to be designated as a statutory representative. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560 (1937). In that case this Court spoke as follows on the point: (page 560)

> "Petitioner assails the certification of the Federation as the representative of the blacksmiths be-

cause less than a majority of that craft, although a majority of those voting, voted for the Federation.

"Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. * * *

"We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer."

The present form of ballot used by the Board and the rules and regulations of the Board meet the statutory requirement as thus interpreted. Indeed, the mere use of the form of ballot required by the District Court's order would not insure that the representative receive a vote of the majority of the craft or class since it would still be possible for a majority of the craft or

class to vote and the representative designated to receive only a majority of such votes.

Thus, the judgment below errs when it reviews and reverses the action of the Mediation Board in determining the form of ballot to be used in a representation election under Section 2, Ninth.

Nor does there appear any justification for reviewing the Mediation Board's determination not to review the composition of the craft or class of employees among whom the representation election shall be held. This Court's decisions cited above establish that this is a matter committed by Congress to the judgment of the Mediation Board.

II

The Actions of the National Mediation Board Constituted a Reasonable Exercise of Its Discretion of the Manner in Which the Board Should Perform Its Functions Under Section 2, Ninth of the Railway Labor Act in the Furtherance of the Purposes of That Statute and Do Not Violate Any Statutory Command.

The basic purpose of the Railway Labor Act is to avoid interruption to interstate commerce by providing for the prompt and orderly settlement of disputes between employees and carriers subject to that statute. The statute is aimed at accomplishing this purpose by inducing collective bargaining between representatives of employees and carriers. Thus, Section 2, First of the Act (45 U.S.C.A., Section 152, First) makes it the duty of all carriers and employees to exert every reasonable effort to make and maintain agreements and to settle disputes in order to avoid interruptions to commerce; Section 2, Second requires that all such disputes "shall be considered, and, if possible, decided, with all expedition, in conference between representa-

tives designated and authorized so to confer * * * by the carrier * * * and by the employees thereof * * * *;" Section 2, Sixth makes it a duty of designated representatives and the carrier to meet and confer with respect to grievances or disputes growing out of the interpretation or application of agreements; Section 6 provides that carriers and "representatives of the employees" shall give written notice of intended changes in agreements and for conferences "between the representatives of the parties interested" in such changes for the purpose of negotiation and mediation, if necessary, thereon; Section 7 provides that when a controversy arises between a carrier and its employees which is not settled either in conference "between representatives of the parties" or by mediation or by the adjustment board, such parties may submit the issue to arbitration.

This Court in its decision in *Virginia Railway Company* v. *System Federation No. 40*, 300 U.S. 515 (1937), specifically recognized that this statutory scheme was aimed at the settlement of disputes between carriers and employees through a process of collective bargaining between representatives of the parties. Thus, the Court stated (page 548) that the statute is "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." In the same opinion the Court stated (page 553) that "What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees * * *." Finally, the Court stated (page 560) that the Act "is

dependent for its operation upon the selection of representatives."

It was to effectuate this purpose that the National Mediation Board, in 1934, designed the form of ballot which has been used in more than 3400 representation elections without material change to the present time. (R. 161-163.) It was the view of the Board in refusing the proposals to change the ballot which it had successfully used for some three decades so as to provide a place for an employee to affirmatively vote "no union" such change would contribute to, if it actually did not encourge, an effort to defeat the statutory purposes. (R. 86.)

This view of the statute, the form of ballot used, and the reasons therefore have been set forth in the offiical publications of the Mediation Board. (R. 161-163.)

It is respectfully submitted that this decision of the Mediation Board constituted a reasonable exercise of its discretion in administering Section 2, Ninth of the Railway Labor Act and does not violate any command of that statute. The form of ballot used recognizes the basic framework of the statute as encouraging collective bargaining, but at the same time does not require any employee to vote for any particular representative or, indeed, to vote for any representative at all. An employee who does not desire representation may simply decline to vote and, if a majority of the employees of the craft or class are in this category, no representative will be elected or certified. (R. 46, 121, 122.) No statutory provision gives an employee the right to be provided a form of ballot on which to record a no representation vote.

Thus, even if the action of the Mediation Board were subject to judicial review, the record discloses that the Board has performed its functions in a reasonable manner within the framework of the statute involved and has not violated any rights granted by the statute.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF RAILWAY LABOR ACT

Section 2, First (45 U.S.C.A., Section 152, First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second (45 U.S.C.A., Section 152, Second):

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Fourth (45 U.S.C.A., Section 152, Fourth):

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in per-

forming any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages, of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Sixth (45 U.S.C.A., Section 152, Sixth):

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held:

Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice:

And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Section 6 (45 U.S.C.A., Section 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 7, First (45 U.S.C.A., Section 157, First):

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise:"